UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case Number: 17-2126

ALISON PATRICIA TAYLOR,
Plaintiff-Appellant,

v

CITY OF SAGINAW; TABITHA HOSKINS,
Defendants-Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN-NORTHERN DIVISION
CASE NUMBER: 1:17-CV-11067
HONORABLE THOMAS L. LUDINGTON

DEFENDANTS – APPELLEES' PETITION FOR REHEARING AND/OR REHEARING EN BANC

ORAL ARGUMENT REQUESTED

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STATEMENT REQUIRED BY RULE 35(b)

Pursuant to Fed. R. App. P. 35(b)(1)(A), the Panel decision in this case conflicts with United States Supreme Court precedent and reconsideration by the Panel and/or consideration by the full Court is, therefore, necessary to secure and maintain uniformity of the Court's decisions. The Panel's decision misapplies the Fourth Amendment and binding precedent interpreting same. Namely, the Panel misapplied *United States v Jones*, 565 US 400 (2012) and *South Dakota v Opperman*, 428 US 364 (1976). In addition, pursuant to Fed. R. App. P. 35(b)(1)(B), the proceeding involves a question of exceptional importance. In light of the Panel's Opinion, cities across the United States have ceased parking enforcement. The question as to whether chalking tires constitutes a Fourth Amendment violation has a significant impact on law enforcement and order in municipalities. Therefore, Defendants – Appellees respectfully request rehearing and/or rehearing *en banc* for the reasons set forth in more detail herein.

BACKGROUND

Plaintiff – Appellant filed her Complaint on April 5, 2017 against the Defendants – Appellees, Tabitha Hoskins and City of Saginaw ("City") alleging a Fourth Amendment violation arising out of the chalking practice employed by the City to enforce local parking. The City filed a Motion to Dismiss pursuant to FRCP 12(b)(6) on June 5, 2017. On September 15, 2017, the District Court issued an Opinion and Order granting the City's Motion to Dismiss. The District Court held that the City's practice of chalking tires constitutes a reasonable search pursuant to the community caretaker exception to the Fourth Amendment's warrant requirement. In addition to the community caretaker exception, the City also argued that the administrative search exception applies. The District Court, in a footnote, stated that "While a plausible argument, the community caretaking exception is a better fit because of the factual similarities in *Cady* and *Opperman*." Plaintiff filed an appeal to this Court. On October 2, 2018, the Panel heard oral argument and issued its opinion on April 22, 2019. An amended Opinion was filed on April 25, 2019.

The facts of this case present a novel argument before this Court: Whether the City's practice of chalking tires to enforce municipal parking ordinance is an unreasonable, warrantless search in violation of the Fourth Amendment. The District Court and this Court's panel held that a search did occur pursuant to the *United*

States v. Jones decision. In *Jones*, the Supreme Court held that the *Katz* reasonable expectation of privacy analysis supplements the common law trespass inquiry to determine whether a search did, in fact, occur. 565 US 400, 409 (2012). However, the facts of *Jones* are distinguishable from the facts herein. Notably, chalking a tire does not provide the government with information like a GPS system attached to a vehicle.

Even assuming chalking a tire was a search within the meaning of the Fourth Amendment, the search was reasonable. The U.S. Supreme Court opinion *South Dakota v Opperman*, 428 US 364 (1976) is the most controlling and factually analogous precedent on this issue. In *Opperman*, the Court held that the community caretaker exception applies and thus a warrantless search is reasonable when the enforcement official is following procedure that is not a pretext for an investigatory motive. *Id*. at 375. In *Opperman*, there was no probable cause that fruits of a crime existed inside the vehicle to conduct a search of the vehicle. *Id*. Moreover, the Supreme Court acknowledged that the community caretaker functions apply when enforcing municipal parking ordinances. *Id*. at 368-369.

The Panel misapplied the facts of this case in light of Supreme Court precedent, *United States v Jones*, 565 US 400 (2012) and *South Dakota v Opperman*, 428 US 364 (1976) when analyzing whether the City conducted a reasonable, warrantless search. Rehearing and/or rehearing *en banc* is requested.

ARGUMENT

I. THE PANEL'S FOURTH AMENDMENT ANALYSIS IS INCONSISTENT WITH SUPREME COURT PRECEDENT.

The panel's application of the Fourth Amendment warrants full consideration by the Court. As this Court is well aware, the Fourth Amendment protects a person from *unreasonable* searches and seizures. U.S. Const. amend. IV. Indeed, searches conducted without a warrant "are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Katz v United States*, 389 US 347, 357 (1976). "An essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions **are not the random or arbitrary acts of government agents**." *Skinner v Railway Labor Executives' Ass'n*, 489 US 602, 61-62 (1989) (Emphasis added). Therefore, two (2) notable exceptions to the warrant requirement necessarily crafted by Federal jurisprudence are community caretaker and administrative searches.

a. THE FACTS OF THIS CASE ARE DISTINGUISHABLE FROM *JONES*. THERE IS NO SEARCH.

In *United States v Jones*, the Supreme Court clarified that the reasonable expectation of privacy standard set forth in *Katz* is in addition to, not substituted for, the traditional application of common law trespass. 565 US 400, 409 (2012). When

resurrecting the common law trespass analysis to define a search, the Court explained:

> We have embodied that preservation of past rights in our very definition of 'reasonable expectation of privacy,' which we have said to be an expectation 'that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.

Id. at 408, citing, *Minnesota v Carter*, 525 US 83 (1998). Notably, it has always been pertinent to Fourth Amendment analysis "the understandings that are recognized and permitted by society." *Carter*, 525 US 83, 88 (1998).

The *Jones* Court held that a mere trespass by a government official, alone, is insufficient to constitute a Fourth Amendment violation. *Jones, supra,* at 404. Rather, a trespass must occur for the purpose of collecting information. *Id.* In *Jones*, law enforcement officers placed a GPS tracking device on the bottom of a vehicle without a valid warrant to do so. *Id*. at 403. The government then tracked the vehicle's movement for twenty-eight (28) days. *Id*. The Court held that the GPS tracking system was an unreasonable search because it was a trespass for the purpose of collecting information related to the car's movement. *Id*. at 404.

Unlike *Jones*, the City utilized chalk to identify how long a vehicle has remained in a two (2) hour parking space. A chalk mark on a tire tread is less invasive than a GPS system. Indeed, once the vehicle moves, the chalk is gone and the City does not collect any information related to the vehicle's whereabouts.

Moreover, a person who parks in a two (2) hour space is aware that the City will enforce the time. This is unlike *Jones* where the individual was not aware that a GPS tracking device was placed on the vehicle. A line of demarcation is simply drawn. Moreover, chalking a tire does not provide the City with any information beyond what a person in plain view can gather. Any individual can observe a vehicle for two (2) hours and note that the vehicle has exceeded the time permitted by ordinance, and delineated by signage. The chalk is employed by the City merely because the City is unable to sit and watch every vehicle within its jurisdiction for two (2) hours at a time. Undoubtedly, the practice of chalking tires to enforce municipal parking ordinance is an understanding recognized and permitted by society.

b. EVEN IF THERE WAS A SEARCH, THE SEARCH WAS REASONABLE UNDER THE COMMUNITY CARETAKER EXCEPTION AND / OR ADMINISTRATIVE SEARCH EXCEPTION.

Any analysis under *Jones* necessarily ends here as that case did not extend beyond whether a search occurred. *See United States v Jones*, 565 US 400 (2012). The Fourth Amendment is clear that the search must be *unreasonable* to constitute a violation. U.S. Const. amend. IV. A warrantless search is per se unreasonable, unless it falls within an exception necessarily crafted by the Federal Courts. *Katz*, *supra*, at 357. As this Court is aware, there are several exceptions to the warrant requirement that constitute a reasonable search under prescribed circumstances. The

approved exceptions include: searches of automobiles, searches incident to arrest, inventory searches, searches during exigent circumstances, and searches the police undertake as part of the "community caretaker" function.

It is well-established law that there is a lesser expectation of privacy with automobiles. *Cardwell v Lewis*, 417 US 583, 590 (1974). Indeed, there is a distinction between warrantless searches of homes and automobiles. *Opperman*, *supra*, 428 US 364, 367 (1976). This distinction is drawn, in part, because, "the inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible." *Id*. In fact, warrantless searches of automobiles are upheld even where there is no danger that the vehicle will leave the jurisdiction. *See e.g. Chambers v Maroney*, 399 US 42, 51-52 (1970); *Cooper v California*, 386 US 58 (1967).

Community caretaking "has been principally applied to the warrantless searches of automobiles." *Taylor v Michigan Dep't of Natural Resources*, 502 F3d 452, 462 (2007). However, the "Sixth Circuit makes it clear that 'the community care-taking function of the police applies only to actions that are totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" *Id*. As explained by this Court, "the community caretaker exception does not provide the government with refuge from the warrant requirement except when delay is reasonably likely to result in injury or ongoing

harm to the community at large." *U.S. v Washington*, 573 F.3d 279, 289 (6th Cir. 2009).

This Court has applied the community caretaker exception in situations where public safety is not at risk. *See e.g. United States v Rohrig*, 98 F.3d 1506, 1509 (6th Cir 1996). "In discharging their varied responsibilities for ensuring the public safety, law enforcement officials are necessarily brought into frequent contact with automobiles. Most of the contact is distinctly noncriminal in nature." *Opperman, supra*, at 367-68, *citing Cady v Dombrowski*, 413 US 433, 442 (1976). In fact, the Supreme Court explained, "to permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities." *Id.* at 368. Moreover,

> Police will also frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic. The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety **and convenience** is beyond challenge.

Id. 368-69. (Emphasis added).

Supreme Court precedent makes it clear that probable cause is not, in fact, necessary before a search must occur. *See e.g. Cooper v California*, 386 US 58 (1976). Indeed, in *Cooper v California*, the Court upheld an inventory search of a

vehicle that occurred a week after the car was impounded and there was no probable cause to search for contraband in the vehicle. *Id* at 58-59.

Similarly, in *Cady v Dombrowski*, the Court upheld a warrantless search of a vehicle even though there was no probable cause to believe that the vehicle contained fruits of a crime. 413 US 433, 436 (1973). The justification was based on community caretaking. *Id*. There was reason to believe that a handgun was in the vehicle. *Id*. The Court in *Cady*, "carefully noted that the protected search was carried out in accordance with *standard procedures* in the local police department, a factor tending to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function." *Opperman, supra*, 428 US at 374-75 (1976).

Equally, in *Opperman*, the police impounded a vehicle for multiple parking violations. *Supra*, 428 US at 375. The police then conducted an inventory search of the vehicle that was prompted by personal belongings in plain view inside the vehicle. *Id*. at 375-76. The Court held that the police were following standard procedure that was not a "pretext" for "concealing an investigatory police motive." *Id*. 376. The Court stated, "On this record we conclude that in following standard police procedures, prevailing throughout the country and approved by the overwhelming majority of courts, the conduct of the police was not 'unreasonable' under the Fourth Amendment." *Id*.

Likewise, the City parking enforcement officers follow standard procedure. All vehicles parked between the hours of 8 a.m. and 6 p.m. will receive a chalk mark to enforce local parking ordinance that has the purpose of ensuring that individuals do not abuse City parking at the expense of others. Individuals and their vehicles are not targeted. This procedure is utilized by municipalities across the country. The city parking regulations are unmistakably posted for the public. The chalking process is limited in scope, necessary only to enforce parking ordinance. Moreover, there is no pretext "for concealing an investigatory motive." The violation of a parking ordinance amounts only to a civil infraction. Stated differently, the placement of chalk on a tire does not reveal any criminal activity to the enforcer.

The community caretaking exception applies when there is ongoing harm to the community and/or a nuisance. *US v Rohrig*, 98 F.3d 1506 (1996). In *US v Rohrig*, this Court was tasked with determining "whether police officers violated the Fourth Amendment by entering a private home without a warrant in the early hours of the morning in response to a neighbor's complaint about loud music emanating from that home." *Id*. at 1509. The Court held that the officers' warrantless entry into the home to abate loud music was not unreasonable. *Id*. Specifically, the Court held that there was ongoing harm to the community, finding that the loud music was a nuisance. *Id.* The search was not unreasonable, "**even though there was no threat of physical injury**." *Washington*, *supra,* 573 F.3d 279 at 288 (Emphasis

added). In fact, it was reasonable for the officers to enter the home without a warrant to prevent any further harm to the community." *Id*. This Court stated, "strict adherence to the warrant requirement would subject the community to a continuing and noxious disturbance for an extended period of time." *Rohrig, supra*, 98 F.3d at 1522.

There is, indeed, a similar ongoing disturbance here. The parking spaces at issue herein provide free two (2) hour parking. There is no time to strictly adhere to the warrant requirement, nor could that plausibly be realistic in terms of spending time and resources on a civil infraction. Moreover, it is a nuisance to the public when members of the community do not have equal access to public parking. Unlike *Rohrig*, there is a lesser expectation of privacy in an automobile, particular a tire tread, than one's home.

Finally, in *Cardwell v Lewis*, this Court held that a warrantless examination of the outside of a vehicle was not unreasonable under the Fourth Amendment. 417 US 583, 591 (1974). The *Cardwell v Lewis* decision is pre-*Jones*; however, *Cardwell* remains good law and analyzes reasonableness under the Fourth Amendment. 417 US 583 (1974). In *Cardwell*, the Supreme Court stated, "with the 'search' limited to the examination of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle left in the public parking lot, we fail to comprehend what expectation of privacy was infringed." *Id*. at 591. Likewise, Plaintiff – Appellant's

interest in the privacy of the tire tread of her automobile is minimal, at best, particularly where Plaintiff – Appellant's vehicle was parked in a public space with knowledge that her tire may be chalked to enforce local ordinance. Plaintiff – Appellant continued to park in the public space albeit receiving fifteen (15) parking tickets for violating time limitations set forth by ordinance and publicized to the public with signs.

If the community caretaker exception is found to not apply, the administrative search exception applies. In *New York v. Burger*, 482 U.S. 691, 716-717 (1987), the Supreme Court upheld the constitutionality of a warrantless administrative inspection on the grounds that the search did not appear to be "a 'pretext' for obtaining evidence of . . . violation of . . . penal laws." Relying on *Burger* and *Colorado v. Bertine*, 479 U.S. 367, 371-372 (1987), the Supreme Court has explained: "the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes." *Whren v. United States*, 517 U.S. 806, 811 (1996) (Emphasis in original).

The alleged search in this case was made to the enforce Michigan statute and local administrative regulations. Parking violations in the City are civil infractions, not a crime. MCL 257.6a The City of Saginaw Code of Ordinances provides that:

> (A) The City Manager is hereby empowered to direct and control traffic; to create quiet and safety zones; to designate and approve of all official traffic control signals; to designate emergency vehicles; to designate streets or portions thereof closed to traffic by reason of construction or repairs; to designate play streets and their hours of use.
>
> (B) The City Manager is hereby empowered, subject to approval of the Council, to designate through streets and the speed limits thereon; to designate the location of all official traffic control signals; **to prescribe the manner and duration of parking of vehicles**; to create loading zones and bus, taxicab, and dray stands; to designate the route of trucks, tractors, and trailers through the City; to designate the maximum weight of any vehicle permitted upon any bridge; to make all needful rules for the direction of traffic or parking of vehicles on any highway, alley or place not unlawful nor inconsistent with this title; and to establish fees for the use of temporary traffic regulatory devices or equipment and block party permits.

(Emphasis added).

In *Camera v Municipal Court of City and County of San Francisco*, the Supreme Court held that the administrative exception to the warrant requirement did not apply. 387 US 523 (1967). The Court reiterated, "Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Id.* at 536-37. Thus, the Court considered several factors to determine reasonableness of an administrative search, including: program history of judicial and public acceptance; public interest in the search; and, the personal nature and/or aim towards the discovery of evidence of a crime. *Id*. at 537. If there is no personal nature for the search or a purpose to discover evidence of a crime, then there is likewise "relatively limited invasion of the urban

citizen's privacy." *Id.* Ultimately, the case turned on the fact that there is no compelling urgency to conduct a routine inspection. *Id*. at 539.

Unlike *Camera*, there is a compelling urgency to conduct the routine "inspection," or chalking of tires. To effectuate parking enforcement in a just and uniform manner, the enforcer must chalk all tires at a particular time, returning after the two (2) hour mark has lapsed. If the enforcer lays dormant, and not routinely chalking tires, then there is no sure method for determining how long a car has been parked. Additionally, there is public acceptance of chalking tires. Tire chalking is a parking enforcement mechanism that has been employed by municipalities for decades. Additionally, there is a strong public interest in the search: equal access to parking spaces. There is also no personal nature attached to tire chalking. Tires of vehicles are chalked uniformly and pursuant to procedure. There is likewise no purpose to discover evidence of a crime. As stated above, a parking violation is a civil infraction, not a crime. Thus, there is very little invasion of citizen privacy. These factors all weigh heavily in favor of a warrantless administrative search. Therefore, tire chalking is not in violation of the Fourth Amendment.

CONCLUSION

The petition for rehearing and/or rehearing en banc should be granted. The Panel has overlooked or misapplied precedent set forth in *United States v Jones*, 565 US 400 (2012) and *South Dakota v Opperman*, 428 US 364 (1976), to this case. Fed.

R. App. P. 35(b)(1)(A). *En banc* rehearing is appropriate when necessary to maintain uniformity of the Court's decisions with Supreme Court precedent. Fed. R. App. P. 35(b)(1)(A). Moreover, the proceeding involves a question of exceptional importance. Fed. R. App. P. 35(b)(1)(B).

RELIEF REQUESTED

WHEREFORE, Defendants – Appellees hereby requests that this Honorable Court grant their Petition for Panel Rehearing or Rehearing *En Banc*.

Respectfully Submitted,

Dated: May 6, 2019

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CERTIFICATE OF COMPLIANCE

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Respectfully Submitted,

Dated: May 6, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send confirmation of such filing to counsel of record at their email address(es) of record.

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ALISON PATRICIA TAYLOR,

Plaintiff-Appellant,

v.

CITY OF SAGINAW; TABITHA HOSKINS,

Defendants-Appellees.

No. 17-2126

Appeal from the United States District Court
for the Eastern District of Michigan at Bay City.
No. 1:17-cv-11067—Thomas L. Ludington, District Judge.

Argued: October 2, 2018

Decided and Filed: April 25, 2019

Before: KEITH, KETHLEDGE, and DONALD, Circuit Judges.

COUNSEL

ARGUED: Philip L. Ellison, OUTSIDE LEGAL COUNSEL PLC, Hemlock, Michigan, for Appellant. Brett Meyer, O'NEILL, WALLACE & DOYLE, P.C., Saginaw, Michigan, for Appellees. **ON BRIEF:** Philip L. Ellison, OUTSIDE LEGAL COUNSEL PLC, Hemlock, Michigan, for Appellant. Brett Meyer, O'NEILL, WALLACE & DOYLE, P.C., Saginaw, Michigan, for Appellees.

AMENDED OPINION

BERNICE BOUIE DONALD, Circuit Judge. The City of Saginaw (the "City") uses a common parking enforcement practice known as "chalking," whereby City parking enforcement officers use chalk to mark the tires of parked vehicles to track how long they have been parked.

Parking enforcement officers return to the car after the posted time for parking has passed, and if the chalk marks are still there—a sign that the vehicle has not moved—the officer issues a citation. Alison Taylor, a frequent recipient of parking tickets, sued the City and its parking enforcement officer Tabitha Hoskins, alleging that chalking violated her Fourth Amendment right to be free from unreasonable search. The City moved to dismiss the action. The district court granted the City's motion, finding that, while chalking may have constituted a search under the Fourth Amendment, the search was reasonable. Because we chalk this practice up to a regulatory exercise, rather than a community-caretaking function, we **REVERSE**.

I.

BACKGROUND

Between 2014 and 2017, Tabitha Hoskins chalked Taylor's tires on fifteen separate occasions and issued her citations in kind. Each citation included the date and time the chalk was placed on her vehicle's tires. The cost of a citation starts at $15 and increases from there.

On April 5, 2017, Taylor filed this 42 U.S.C. § 1983 action against the City, alleging defendants violated her Fourth Amendment right against unreasonable searches by placing chalk marks on her tires without her consent or a valid search warrant. Taylor also sued Hoskins in her individual capacity. The defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), asserting that chalking was not a search within the meaning of the Fourth Amendment, or alternatively, if it was a search, it was reasonable under the community caretaker exception.[1] Hoskins also asserted a qualified immunity defense.

[1]The City also argued that the search fell within the administrative search exception. However, the City does not raise this on appeal. Therefore, we do not address it here.

The district court granted the defendants' motion to dismiss, finding that the City engaged in a search as defined by the Fourth Amendment by placing chalk marks on Taylor's tires to gather evidence of a parking violation. The district court, however, agreed with the defendants that the search was reasonable because: (1) there is a lesser expectation of privacy in automobiles; and (2) the search was subject to the community caretaker exception to the warrant requirement.[2] Taylor timely appeals.

II.

ANALYSIS

A. Standard of Review

"We review de novo a district court's decision to grant a motion to dismiss for failure to state a claim under Rule 12(b)(6)." *In re Darvocet, Darvon, & Propoxyphene Prods. Liab. Litig.*, 756 F.3d 917, 926 (6th Cir. 2014). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). On a motion to dismiss, "[w]e must construe the complaint in the light most favorable to the plaintiff and accept all allegations as true." *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012). "The defendant has the burden of showing that the plaintiff has failed to state a [plausible] claim for relief." *DirectTV, Inc., v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007) (citing *Carver v. Bunch*, 946 F.2d 451, 454–55 (6th Cir. 1991)).

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "The basic purpose of this Amendment, as recognized in countless decisions of [the Supreme] Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Mun. Court of City & Cty. of S.F.*, 387 U.S. 523, 528

[2]Because the district court found that the search did not amount to a Fourth Amendment violation, it did not address Hoskins' qualified immunity defense.

(1967). The Fourth Amendment "gives concrete expression to a right of the people which 'is basic to a free society.'" *Id.* (quoting *Wolf v. People of State of Colorado*, 338 U.S. 25, 27 (1949)).

To determine whether a Fourth Amendment violation has occurred, we ask two primary questions: first, whether the alleged government conduct constitutes a search within the meaning of the Fourth Amendment; and second, whether the search was reasonable. We address each in turn.

B. Search

The answer to the first question is yes, chalking is a search for Fourth Amendment purposes. The Supreme Court has articulated two distinct approaches to determine when conduct by a governmental agent constitutes a search. Under the most prevalent and widely-used search analysis articulated in *Katz. v. United States*, 389 U.S. 347 (1967), a search occurs when a government official invades an area in which "a person has a constitutionally protected reasonable expectation of privacy." *Id.* at 360 (Harlan, J., concurring). Under *Katz*, a search is analyzed in two parts: "first that a person exhibit an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361. A "physical intrusion" is not necessary for a search to occur under *Katz*. *See id.* at 360.

In recent years, however, the Supreme Court revisited the seldom used "property-based" approach to the Fourth Amendment search inquiry in *United States v. Jones*, 565 U.S. 400 (2012). Under *Jones*, when governmental invasions *are* accompanied by physical intrusions, a search occurs when the government: (1) trespasses upon a constitutionally protected area, (2) to obtain information. *Id.* at 404–405.

In *Jones*, the government surreptitiously attached a GPS device to a car to track the car's movements. *Id.* at 403. The Supreme Court held that the government's trespass upon an effect—the vehicle—to obtain information related to the car's movement was a search. *Id.* at 404–405. *Jones* echoed the understanding that the "[t]he *Katz* reasonable-expectation-of-privacy test has been *added to*, not substituted for, the common-law trespassory test." *Id.* at 409.

(emphasis in original). For our purposes, *Jones* provides the appropriate analytical framework for determining whether chalking constitutes a search within the meaning of the Fourth Amendment.

In accordance with *Jones*, the threshold question is whether chalking constitutes common-law trespass upon a constitutionally protected area. Though *Jones* does not provide clear boundaries for the meaning of common-law trespass, the Restatement offers some assistance. As defined by the Restatement, common-law trespass is "an act which brings [about] intended physical contact with a chattel in the possession of another." Restatement (Second) of Torts § 217 cmt. e (1965). Moreover, "[a]n actor may . . . commit a trespass by so acting upon a chattel as intentionally to cause it to come in contact with some other object." *Id.* Adopting this definition, there has been a trespass in this case because the City made intentional physical contact with Taylor's vehicle. As the district court properly found, this physical intrusion, regardless of how slight, constitutes common-law trespass. This is so, even though "no damage [is done] at all." *Jones*, 565 U.S. at 405 (quoting *Entick v. Carrington*, 95 Eng. Rep. 807, 817 (C.P. 1765)).

Our search analysis under *Jones* does not end there. Rather, once we determine the government has trespassed upon a constitutionally protected area, we must then determine whether the trespass was "conjoined with . . . an attempt to find something or to obtain information." *Id.* at 408 n.5. Here, it was. Neither party disputes that the City uses the chalk marks for the purpose of identifying vehicles that have been parked in the same location for a certain period of time. That information is then used by the City to issue citations. As the district court aptly noted, "[d]espite the low-tech nature of the investigative technique . . . , the chalk marks clearly provided information to Hoskins."[3] This practice amounts to an attempt to obtain information under *Jones*.[4]

[3]For the first time on appeal, the City latches on to the district court's passing implication that chalking is so widespread and long-standing, that society may have granted it an implied license. Therefore, the City contends, chalking is not a trespass, and thus not a search. As support, the City relies on *Florida v. Jardines*. 569 U.S. 1, 8 (2013), where the Supreme Court held that when the government engages in activity that is expected from ordinary citizens, an implied license might exist for the activity. But *Jardines* does little to further the City's argument. *Jardines* does not broadly proposition that every "widespread" trespass by the government constitutes an implied license. Rather, only when a government trespass is "no more than any private citizen might do" (i.e. to approach a

Having answered the first question under our Fourth Amendment analysis, we now turn to whether the search was reasonable.

C. Reasonableness

Taylor argues that the search was unreasonable because the City fails to establish an exception to the warrant requirement. Specifically, Taylor argues that the search at issue is not covered by the community caretaker exception and that the City fails to establish that any other exception applies to their warrantless search. The City responds that, even if chalking is a search under *Jones*, the search was reasonable because there is a reduced expectation of privacy in an automobile. The City further contends that the search was subject to the community caretaker exception. We disagree with the City.

The Fourth Amendment does not proscribe all searches, "but only those that are unreasonable." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). "[W]e must begin with the basic rule that searches conducted outside the judicial process, without prior approval by [a] judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *United States v. Hockenberry*, 730 F.3d 645, 658 (6th Cir. 2013) (quotation marks omitted). The government bears the burden of demonstrating an exception to the warrant requirement. *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

The district court found that the City's warrantless search of Taylor's vehicle was reasonable because there is a lesser expectation of privacy with automobiles. We disagree. Though an automobile enjoys a "reduced expectation[] of privacy" due to its "ready mobility,"

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person's home and knock on the front door), might a license be implied. *Id.* On this record, the City fails to establish a common practice among private citizens to place chalk marks on other individual's tires—much less to obtain evidence of wrongdoing—that would amount to the type of "customary invitation" described in *Jardines*. *Id.* at 9.

[4]Employing a similar *Jones* analysis, the district court in *Schmidt v. Stassi*, 250 F.Supp.3d 99, 101 (E.D. La. 2017), found that an officer's collection of DNA from the defendant's car door while it was parked at a shopping mall was a search under the Fourth Amendment. The court made clear that it was not the collection of Schmidt's DNA that made it a search, rather, it was that the DNA swab "involved the physical touching" of Schmidt's vehicle to obtain information. *Id.* at 103–04. The fact that it occurred in a public parking lot and "did not damage the [vehicle] in any way," was not significant to the search inquiry. *Id.* The same is true here.

California v. Carney, 471 U.S. 386, 392 (1985), we explained that this diminished expectation of privacy is what justified the automobile exception to the warrant requirement. *Autoworld Specialty Cars, Inc. v. United States*, 815 F.2d 385, 389 (6th Cir. 1987). The automobile exception permits officers to search a vehicle without a warrant if they have "probable cause to believe that the vehicle contains evidence of a crime." *United States v. Smith*, 510 F.3d 641, 647 (6th Cir. 2007) (citation omitted). No such probable cause existed here. Thus, the automobile exception is inapplicable.

Undeterred, the City relies on the Supreme Court's pre-*Jones* decision in *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974), to justify its warrantless search based solely on a vehicle's reduced expectation of privacy. In *Cardwell*, after the police secured a warrant for Lewis' arrest and arrested him, the police towed his car to a police impoundment lot, where a warrantless search of the outside of his car revealed paint scrapings tying Lewis' car to the fender of the victim's car. *Id.* at 587, 588. Lewis was later tried and convicted of murder. *Id.* at 585. As the City's argument goes, if scraping paint from a car without a warrant was held reasonable in *Cardwell*, then certainly placing washable chalk on a vehicle's tire is reasonable.

Crucial distinctions in *Cardwell* deflate the City's argument. First, the vehicle in *Cardwell* was towed by the police following Lewis' arrest. *Id.* at 587. Second, and most important, the warrantless search in *Cardwell* was upheld on the basis that it was conducted upon "probable cause," *id.* at 589—an, "established" exception to the warrant requirement, *Carney*, 471 U.S. at 392—not simply the vehicle's reduced expectation of privacy. Here, unlike *Cardwell*, the City commences its search on vehicles that are parked legally, without probable cause or even so much as "individualized suspicion of wrongdoing"—the touchstone of the reasonableness standard. *See Relford v. Lexington-Fayette Urban Cty. Gov't*, 390 F.3d 452, 458 (6th Cir. 2004) ("[A] search ordinarily must be based on individualized suspicion of wrongdoing."). Thus, we reject the City's contention that searching Taylor's vehicle was reasonable based solely on its reduced expectation of privacy.

Next, the City attempts to seek refuge in the community caretaker exception. This exception applies "whe[n] . . . government actors [are] performing 'community-caretaker' functions rather than traditional law-enforcement functions." *Ziegler v. Aukerman*, 512 F.3d

777, 785 (6th Cir. 2008). Unlike other exceptions, it requires that we "look at the *function* performed by a [government agent]" when a search occurs. *Hunsberger v. Wood*, 570 F.3d 546, 554 (4th Cir. 2009) (emphasis in original). To apply, this function must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

This exception has its genesis in the Supreme Court's decision in *Cady v. Dombrowski*. There, the defendant's vehicle was disabled as a result of an accident and left on the side of the road following his arrest for drunk-driving. *Id.* at 443. Pursuant to "standard procedure," police officers conducted a search of the defendant's vehicle to retrieve a revolver reasonably suspected of being in the trunk. *Id.* The Court found the search was reasonable, as it was "to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands." *Id.*

We explained that "the community caretaker exception does not provide the government with refuge from the warrant requirement except when delay is reasonably likely to result in injury or ongoing harm to the community at large." *United States v. Washington*, 573 F.3d 279, 289 (6th Cir. 2009). Courts have applied the community caretaker exception in narrow instances when public safety is at risk. *See e.g., South Dakota v. Opperman*, 428 U.S. 364, 369 (1976) (applying the community caretaker exception to a warrantless inventory search of a vehicle after it was impounded for violating parking ordinances, which had jeopardized the public safety and the efficient movement of vehicular traffic); *see also United States v. Sanchez*, 612 F.3d 1, 7 (1st Cir. 2010) (upholding the community caretaker exception to a warrantless vehicle impoundment, when officers were acting "not as investigators but as community caretakers, responsible for protecting public safety and preventing hazards by removing vehicles that impede traffic, risk vandalism, or create inconvenience.") (Lynch, J., concurring).

The City fails to carry its burden of establishing that the community caretaker exception applies in this instance. First, on these facts, the City fails to demonstrate how this search bears a relation to public safety. The City does not show that the location or length of time that Taylor's vehicle was parked created the type of "hazard" or traffic impediment amounting to a public safety concern. Nor does the City demonstrate that delaying a search would result in "injury or

ongoing harm to the community." *Washington*, 573 F.3d at 289. To the contrary, at the time of the search, Taylor's vehicle was lawfully parked in a proper parking location, imposing no safety risk whatsoever. Because the purpose of chalking is to raise revenue, and not to mitigate public hazard, the City was not acting in its "role as [a] community caretake[.]" *Id.* at 287.

The cases the City cites in support of its position that it is engaging in a community caretaking are distinguishable. First, the City relies on *United States v. Rohrig*, 98 F.3d 1506, 1509 (6th Cir. 1996), where we applied the community caretaker exception to an officer's warrantless entry of a home after neighbors complained of excessively loud music and the defendant could not hear the officer's constant knocks at the door. There, we recognized that "strict adherence to the warrant requirement would subject the community to a continuing and noxious disturbance for an extended period of time." *Id.* at 1522. No similar ongoing public disturbance exists here to justify a warrantless search.

The City also relies on two First Circuit cases, *United States v. Coccia*, 446 F.3d 233, 239 (1st Cir. 2006) and *United States v. Rodriguez-Morales*, 929 F.2d 780, 785 (1st Cir. 1991), that are likewise distinguishable (and not controlling). In *Coccia*, the First Circuit upheld the warrantless search of a vehicle based in part on the officer's belief that the vehicle "might contain items constituting a threat to public safety, such as explosive material, chemicals or biological agents." *Coccia*, 446 F.3d at 240. Similarly, in *Rodriguez-Morales*, following the defendant's arrest, the officer impounded his vehicle. *Rodriguez-Morales*, 929 F.2d at 785. Applying the community caretaker exception, the court explained that leaving the vehicle on the shoulder of the highway "not only . . . posed a safety threat, but also would have been easy prey for vandals." *Id.* at 786. Again, the common ingredient in both *Coccia* and *Rodriguez-Morales*, but not present here, is the threat to "public safety."[5]

The City points to the importance of "maintaining efficient, orderly parking." While the City is entitled to maintain efficient, orderly parking, the manner in which it chooses to do so is

[5]Placing emphasis on the phrase "*criminal* statute" in *Cady*, the City advances the argument that, because the search here was conducted to obtain evidence relating to the violation of a "civil statute," it cannot be barred from invoking the community caretaker exception. However, because we hold that the community caretaker exception fails in other regards, we need not reach this issue.

not without constitutional limitation. As the Supreme Court explains, "the [Fourth] Amendment does not place an unduly oppressive weight on [the government] but merely . . . an orderly procedure. . . ." *Jeffers*, 342 U.S. at 51 (citation omitted).

The City does not demonstrate, in law or logic, that the need to deter drivers from exceeding the time permitted for parking—before they have even done so—is sufficient to justify a warrantless search under the community caretaker rationale. This is not to say that this exception can never apply to the warrantless search of a lawfully parked vehicle. Nor does our holding suggest that no other exceptions to the warrant requirement might apply in this case. However, on these facts and on the arguments the City proffers, the City fails to meet its burden in establishing an exception to the warrant requirement.

III.

CONCLUSION

Taking the allegations in Taylor's complaint as true, we hold that chalking is a search under the Fourth Amendment, specifically under the Supreme Court's decision in *Jones*. This does not mean, however, that chalking violates the Fourth Amendment. Rather, we hold, based on the pleading stage of this litigation, that two exceptions to the warrant requirement—the "community caretaking" exception and the motor-vehicle exception—do not apply here. Our holding extends no further than this. When the record in this case moves beyond the pleadings stage, the City is, of course, free to argue anew that one or both of those exceptions do apply, or that some other exception to the warrant requirement might apply.

For the reasons above, we **REVERSE** the district court's order granting the City's motion to dismiss and **REMAND** for further proceedings consistent with this order.